STATE OF ALASKA,
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

IBLA 82-1138 Decided October 8, 1982
ANCAB VLS 80-28

Appeal from decision of Alaska State Office, Bureau of Land Management, finding lands proper for village selection and approved for interim conveyance. F 14913-A, F 14913-B.

Affirmed.

1. Alaska: Alaska Native Claims Settlement Act -- Alaska Native Claims Settlement Act: Generally -- Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights -- Withdrawals and Reservations: Generally

Land withdrawn for an air navigation site is public land within the context of 43 U.S.C. § 1613 (1976 and Supp. IV 1980), and is proper for selection by a Native village.

Land withdrawn by Executive order for use as an air navigation site by the Alaska Road Commission was not thereby severed from the public domain and under the terms of the order remained under the jurisdiction of the Secretary of the Interior. No interest, legal or equitable, could be conveyed to the Territory of Alaska by a withdrawal for an air navigation site. Interests in the public lands of the United States can be conveyed only pursuant to an Act of Congress.

Land used for an airport site which is conveyed to a Native village must be subsequently conveyed to the State of Alaska pursuant to 43 U.S.C. § 1613(c)(4) (Supp. IV 1980).

APPEARANCES: Martha Mills, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for appellant; M. Francis Neville, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; William H. Timme, Esq., Anchorage, Alaska, for Gana-a 'Yoo, Limited.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The State of Alaska, Department of Transportation and Public Facilities, appeals the decision dated May 21, 1980, wherein the Alaska State Office, Bureau of Land Management (BLM), declared certain lands for village selection pursuant to section 12, Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (1976 and Supp. IV 1980), and approved an interim conveyance of the surface estate to Gana-a 'Yoo, Limited, pursuant to section 14(a) of ANCSA, 43 U.S.C. § 1613 (1976 and Supp. IV 1980). 1/

Appellant states that BLM failed to exclude the land withdrawn in Air Navigation Site (ANS) 153, on which the State has operated and maintained Nulato Airport for some 40 years. The State argues that BLM should exclude the Nulato Airport from the conveyance because the State claims a property interest in the land by virtue of ANS 153, a withdrawal for the benefit of the State. The State contends that ANS 153 was withdrawn pursuant to 49 U.S.C. § 214 (1970), 2/ and that 43 CFR 251.14 (1939) provided that the State could maintain an airport on the withdrawn land, under conditions similar to a lease but with no rental being charged. The original withdrawal of January 28, 1941, stated the land in Nulato landing field was withdrawn from all forms of appropriation under the public land laws and reserved for use of the Alaska Road Commission in maintenance of the air navigation facilities. 6 FR 829 (1941). The withdrawal was modified June 14, 1955, to delete "for use of the Alaska Road Commission" and substitute therefor "under the jurisdiction of the Department of the Interior, for the benefit of the Territory of Alaska, Department of Aviation." 20 FR 4329 (1955). The State contends the change in language created a "trust situation" and that the Department of the Interior cannot revoke an interest in ANS 153 which is the legal equivalent of fee simple on a condition subsequent since the Secretary has discretion to cancel the withdrawal only upon occurrence of one of the conditions for revocation as listed in 43 CFR 251.19 (1939). Kern River Land Co. v. United States, 257 U.S. 147, 152 (1921), is cited as support for the proposition that a right-of-way is neither a mere easement nor a fee simple absolute, but a limited fee on implied conditions of reverter. The State asserts that ANS 153 should have been transferred to the State of Alaska upon statehood as intended by sections 5 and 6(k) of the Alaska

1/ This appeal was docketed originally with the Alaska Native Claims Appeal Board as ANCAB VLS 80-28. That Board was abolished effective June 30, 1982, by Secretarial Order No. 3078, dated Apr. 29, 1982, and its functions were consolidated under the jurisdiction of this Board. 47 FR 26390 (June 18, 1982).

2/ 49 U.S.C. § 214 (1970) was repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792, Oct. 21, 1976.

Statehood Act, 72 Stat. 339, July 7, 1958. In addition, the State contends that the Alaska Omnibus Act, 73 Stat. 141, June 25, 1959, appears to have intended to transfer to the State all interests of the Federal Government which normally would be within the province of the State government, as section 21 transferred all lands or interests held by the Secretary of Commerce in connection with the highway system in Alaska, and section 35 transferred all public airports constructed and operated under the Act of May 28, 1948, 48 U.S.C. § 485 (1958), by the Federal Aviation Agency (FAA). The State asserts the only airports built pursuant to the 1948 Act were those in Anchorage and Fairbanks, but that FAA transferred many more airports to the State pursuant to the Omnibus Act, so that ANS 153 should have been conveyed to the State. The State assumes that FAA rather than the Department of the Interior should have had jurisdiction over the Nulato Airport.

The State argues that ANCSA does not require conveyance of any ANS held for the benefit of the State of Alaska. It states that the land in any ANS is not a Federal installation and so falls within the definition of public lands in section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1976), but that it is difficult to categorize the ANS as a lease, contract, permit, right-of-way, or easement, i.e., interests which do not lead to title, or as a valid existing right leading to title. The State then suggests that the Secretary of the Interior is acting as a trustee for the State under the terms of ANS 153, and arguably because of Interior's responsibility the ANS might logically be termed a Federal installation. The State contends that disposal statutes, such as ANCSA, do not apply to lands which are not clearly subject to disposition by its terms, citing Federal Power Commission v. State of Oregon, 349 U.S. 45 (1955), and United States v. State of Minnesota, 270 U.S. 181 (1926). It also argues that BLM cannot bring about a revocation of an ANS by conveyance of the land to a village corporation, citing City of Phoenix v. Reeves, 14 IBLA 315, 65 I.D. 65 (1974), as a strong presumption against implied repeal of an Executive order.

The State contends that BLM should have identified the ANS in its decision of intention to convey, and argues that the failure to do so creates a cloud on the State's interest. It states that section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976), recognizes valid existing rights and makes conveyances under the Act subject to such valid existing rights. It also argues that the lands in ANS 153 were not "public lands," but were "withdrawn from all forms of appropriation under the public land laws," and as the State had entered upon and occupied ANS 153 prior to August 31, 1971, its use and occupancy should be recognized and protected by 43 CFR 2560.3-1(b). In conclusion, the State contends that title to ANS 153 should have been transferred to the State of Alaska pursuant to section 35 of the Alaska Omnibus Act, that ANS 153 is not available for transfer to a village corporation pursuant to ANCSA, and that BLM should not consummate the proposed conveyance of ANS 153 to Gana-a 'Yoo, Limited.

BLM answered the statement from the State of Alaska, disagreeing with the assertion that ANS 153 transferred any interest in the land, legal or equitable, to the Territory of Alaska, and further that any such asserted interest has been transferred from the territory to the State of Alaska, so that there is no basis for the Board to grant any relief that the State has requested.

BLM states that ANS 153 did not transfer an interest in Nulato Airport to the Territory of Alaska. BLM is unable to agree with the opinion of the State that the withdrawal pursuant to 49 U.S.C. § 214 (1970) transferred an interest "which is the legal equivalent of a fee simple on condition subsequent." BLM asserts that the United States does not transfer interests in real property by withdrawal orders. It states that since a withdrawal or reservation of land is a statutory or administrative action restricting a designated tract of land from full operation of the public land laws and sets the land apart for a specific purpose, the withdrawal order is not a conveyance of land or a conveyance of an interest in the land. BLM states that ANS 153 was made pursuant to 49 U.S.C. § 214 (1970), but that statute clearly does not give the Secretary authority to convey an interest in lands withdrawn for an ANS. BLM argues that the statute only authorizes the Secretary to grant permission to establish air navigation facilities, and withdraws the land to facilitate such purposes.

BLM asserts that the Secretary may not convey any interest in lands belonging to the United States without explicit authority from Congress, and only Congress has the power to dispose of the property of the United States. Art. IV, § 3, cl. 2 of the Constitution. See Royal Indemnity Co. v. United States, 313 U.S. 289 (1949); Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975). BLM states that the Secretary can alienate interests in land belonging to the United States only within the limits authorized by law (512 F.2d at 749), but that 49 U.S.C. § 214 (1970) cannot reasonably be read as authorizing a conveyance of any interest in land to the Territory of Alaska. BLM further states that grants of land to the territory were set forth by Congress in explicit terms in various statutes. See, e.g., Mental Health Enabling Act, 70 Stat. 709 (1956), and the Act making additional grants of lands to the Agricultural College and School of Mines of the Territory of Alaska, 45 Stat. 1091 (1929).

Although the State contends the withdrawal of ANS 153 "for benefit of the Territory of Alaska" created a trust whereby the Department of the Interior held the lands in trust for the territory, BLM contends that there are certain essential elements of a trust which could not be met by ANS 153. In a trust situation, the beneficiary of the trust has equitable ownership of property while the trustee has legal title. But as the Secretary cannot transfer any interest in property of the United States without express authorization from Congress, and no authority had been granted by 49 U.S.C. § 214 (1970), the statutory authority for ANS 153, BLM argues that the language of the withdrawal cannot be construed as creating a trust.

BLM states that the arguments of the State that the Territory acquired an interest in the lands embraced by ANS 153 must be rejected. It argues that 49 U.S.C. § 214 (1970) did not authorize the Secretary to convey any interest, legal or equitable, in lands withdrawn to the Territory so any attempted transfer of such interest would be void. Union Oil Co. of California v. Morton, supra.

BLM disagrees with the State's contention that sections 5 and 6(k) of the Statehood Act entitled the State to succeed to all interests of the territory and that Nulato Airport was or should have been transferred to the State

at the time statehood was achieved. BLM maintains that the territory had no interest in the lands embraced in ANS 153 which could be transferred to the State. BLM contends section 5 and 6(k) are more limited than the State suggests. It states that section 5 of the Statehood Act provides that the State shall have and retain title to all property, real and personal, which title is in the Territory of Alaska, and the United States shall retain title to all property, real and personal, to which it has title, including the public lands. As no title to the land in ANS passed to the territory, and as the land was withdrawn under jurisdiction of the Secretary of the Interior, BLM argues that it is clear that the United States retained title under section 5 of the Statehood Act.

Section 6(k) of the Statehood Act confirmed the transfer of title from the territory to the State only of land, fee title to which had been granted to the territory. BLM contends that Congress used the term "grants" in section 6(k) in the ordinary and usual sense, lands given to the territory pursuant to some Act of Congress. BLM states that Federal grants are to be construed in favor of the United States lest they be enlarged to include more than that which Congress expressly included. United States v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Union Pacific R.R., 353 U.S. 112 (1957).

BLM contends that section 35 of the Alaska Omnibus Act did not provide for the transfer of all public airports to the State, as the State argues, but that the section applied only to airports constructed and operated pursuant to the Act of May 28, 1948, 48 U.S.C. § 485 (1958), and by its terms the Act was limited to the Anchorage and Fairbanks airports. BLM disagrees with the State's contention that because other airports were transferred to the State by the Secretary of Commerce, Nulato Airport should be presumed to have been similarly transferred. BLM states the only airports so transferred were named in a quitclaim deed executed by the Secretary of Commerce June 30, 1959. The quitclaim deed was executed pursuant to authority in section 21 of the Alaska Omnibus Act, not section 35, and the only interests conveyed were those "owned, held Administered or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska." BLM states that Nulato Airport could not have been included in the quitclaim deed because it was under the jurisdiction of the Department of the Interior. BLM also points out that the State cannot rely on section 45 of the Omnibus Act for support to its request for transfer of Nulato Airport as such transfers had to be completed by July 1, 1966. BLM states that section 46 of the Act provided for establishment of a commission to settle disputes between the United States and the State of Alaska prior to January 1, 1965, concerning transfer, conveyance, or other disposal of property to the State of Alaska pursuant to section 6(e) of the Statehood Act, and the State may not now assert it should have received a deed to Nulato Airport under the Omnibus Act.

BLM contends the aurorities cited by the State do not support its argument that BLM cannot revoke ANS 153 without consent of the State, and that ANCSA therefore does not mandate conveyance of the airport lands to Gana-a 'Yoo, Limited. BLM states that there is no requirement that the

Secretary obtain the State's consent to a revocation of a withdrawal. Section 204(i) of FLPMA, 43 U.S.C. § 1714(i) (1976), provides that the Secretary shall make, modify, or revoke withdrawals only with consent of the head of the department or agency concerned. BLM states that prior to FLPMA, the Secretary's authority to make, modify, or revoke withdrawals was set forth in Executive Order No. 10355, May 26, 1952, 17 FR 4831, and that section 1(c) of that order required the Secretary to obtain concurrence from the head of the department having administrative jurisdiction over the land. BLM asserts that nowhere is there any requirement that would support the position of the State. BLM argues that Rimrock Canal Co., 9 IBLA 333 (1973), which was cited by the State, does not support the proposition that the Secretary cannot revoke a withdrawal for the benefit of a state without first consulting with the state and considering its response. BLM states that Rimrock dealt with a right-of-way application over land withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-664 (1976), and that the decision held that the state must be consulted before granting a discretionary right-of-way, as required by the Act.

BLM does not consider the 1928 regulation relating to cancellation of an airport lease as applicable to ANS 153. It states that the regulation cannot bind the Congress. The State recognizes that withdrawal orders can be revoked upon authority of a specific statute. BLM contends that the provisions of ANCSA mandate conveyance of ANS 153. ANCSA is not a general land disposal statute but is unique legislation enacted to settle aboriginal claims by the Alaska Natives. Under general land disposal statutes, withdrawn land is unavailable for entry, location, settlement, or conveyance. Under ANCSA, all Federal interests in land surrounding the Native villages are available for selection and conveyance, except for certain specific interests clearly defined in the Act. BLM states that withdrawn lands must be conveyed to the Native corporations unless they fall within one of the limited exceptions set forth in the Act, and under the terms of Public Land Order (PLO) No. 5444, November 4, 1974, 39 FR 39879, all orders of withdrawal are automatically revoked upon conveyance of the land.

Finally, BLM maintains that section 14(c) of ANCSA adequately protects the rights of the State of Alaska and ensures that Nulato Airport will remain available for public use.

[1] The principal argument of the State appears to be that ANS 153 should have been transferred to the State pursuant to section 35 of the Alaska Omnibus Act, and as a consequence ANS 153 is not available for conveyance to the Native Village Corporation pursuant to ANCSA.

ANS 153 was created by an order of Assistant Secretary Oscar L. Chapman, January 28, 1941, pursuant to section 4 of the Act of May 24, 1928, 49 U.S.C. § 214 (1970). The order provided:

> It is ordered, under and pursuant to the provisions of section 4 of the act of May 24, 1928, 45 Stat. 729, 49 U.S.C., sec. 214, that the public lands in Alaska lying within the following-described boundaries be, and they are hereby, withdrawn from all forms of appropriation under the public-land

> laws, subject to valid existing rights, as landing fields at Manley Hot Springs and Nulato, for the use of the Alaska Road Commission in the maintenance of air navigation facilities.

The order withdrew, for Nulato Field, the following described tract:

NULATO FIELD

> Beginning at corner No. 1, from which corner No. 6 of U.S. Survey No. 2247, School Reserve, Latitude 64 degrees 44' N., Longitude 158 degrees 04' W., bears S. 51 degrees 51' W., 2646 feet.
>
> From corner No. 1, by metes and bounds,
>
> S. 47 degrees 30' E., 500 feet to corner No. 2;
> N. 42 degrees 30' E., 6000 feet to corner No. 3;
> N. 47 degrees 30' W., 500 feet to corner No. 4;
> S. 42 degrees 30' W., 6000 feet to corner No. 1, the place of beginning, containing 68.87 acres. 3/

At no place does the order suggest, even remotely, that title to the withdrawn land was other than in the United States, or that there was any contemplated conveyance of the land to the Alaska Road Commission.

It must be held, therefore, that the land in ANS 153 remained public land of the United States under jurisdiction of the Secretary of the Interior. As no title to the land was vested in the Territory of Alaska, the provisions of section 5 of the Statehood Act do not and cannot apply. Similarly, none of the grants in section 6 of the Statehood Act apply as the State did not make any application to select the land in ANS 153 under any of the quantity grants. It thus follows that ANS was public land under jurisdiction of the Secretary of the Interior at the time of enactment of ANCSA December 18, 1971.

ANCSA provided that qualified Native villages could select areas of public lands commensurate to the village population and the patents would be subject to the requirements set out in section 14 of the Act, 43 U.S.C. § 1613 (1976 and Supp. IV 1980). PLO 5444 effected a blanket revocation of every withdrawal affected upon issuance of a patent.

43 U.S.C. § 1613(c)(4) (Supp. IV 1980) provides:

> (4) the Village Corporation shall convey to the Federal Government, State, or to the appropriate Municipal Corporation, title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure

3/ ANS 153 is within protracted secs. 4 and 9, T. 9 S., R. 4 E., Kateel River meridian, and is within the area selected by Gana-a 'Yoo, Limited, F 14913-A.

safe approaches to airport runways as such airport sites, runways, and other facilities existed as of December 18, 1971;

Section 14(c)(4) of ANCSA, as amended by section 1404(c) of the Alaska National Interest Lands Conservation Act, 95 Stat. 2371, 2493.

In State of Alaska, 7 ANCAB 157, 89 I.D. 321 (1982), the former Alaska Native Claims Appeals Board (ANCAB) considered an identical situation relating to ANS 131 and a conveyance to the Native Village of Takotna. There ANCAB held that the conveyance document to be issued by BLM to the village will include any and all covenants which the Secretary deems necessary to ensure the fulfillment of the village corporation's pursuant to 43 U.S.C. § 1613(c)(4) (Supp. IV 1980), supra. The ANCAB decision has been modified by State of Alaska, 67 IBLA 344 (1982). 4/

Upon execution of a conveyance of the land in ANS 153 to Gana-a 'Yoo, Limited, as the Nulato Airport was in existence December 18, 1971, title to the surface estate of Nulato Airport must be conveyed to the State of Alaska by the village corporation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1(b)(3)(i), as amended, 43 FR 26390 (June 18, 1982), the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

4/ By decision dated June 23, 1982, ANCAB held in part that 43 CFR 2651.6(b) requires different treatment for conveyances subject to section 14(c)(4) reconveyances and that the reference to section 14(c) in the general reservations used by BLM in interim conveyance decisions such as the one in this case is insufficient to protect the interests granted by subsection 14(c)(4). State of Alaska, Department of Transportation and Public Facilities, 7 ANCAB 157, 89 I.D. 321 (1982). This Board recently ruled that a conveyance made subject to the provisions of section 14(c) necessarily includes the requirements of subsection 14(c)(4) and modified the ANCAB decision to the extent that it required BLM to modify the conveyance decision to separately reference the interests protected by subsection 14(c)(4). State of Alaska, Department of Transportation and Public Facilities, 67 IBLA 344 (1982).